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No. 75-1072

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOE LINDEN BLANTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. A 1-8) nor the opinion of the district court on petitioner's pretrial motion to dismiss the information (Pet. App. B 1-17) is reported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1975. The petition for a writ of certiorari was filed on January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the non-prejudicial miscitation in the information of the statute petitioner was accused of having violated deprived him of the right to be informed on the nature and cause of the charges against him, in violation of the Sixth Amendment.

2. Whether petitioner's acquittal on a conspiracy charge precluded his conviction upon the substantive offenses in a unitary trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of seventeen counts of infringing the copyrights of sound recordings, in violation of 17 U.S.C. 1(f) (Supp. IV) and 104. He was fined $200 on each count and sentenced to concurrent terms of six months' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner and indicted co-conspirators Joseph and William Bodin manufactured tapes of copyrighted sound recordings without the consent of the copyright owners (Pet. App. A 8).[1] Thereafter, petitioner wilfully distributed these tapes at a profit (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 5) that he was prejudiced by the miscitation in the information of the statute under which he was charged. He alleges that until just prior to the charge to the jury, he was unable to determine whether he was accused of infringing the copyrights of sound recordings or musical compositions, to the detriment of his ability to prepare a defense.

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[1]Joseph Bodin pleaded guilty to the conspiracy charge before trial. All other charges against him and his son, government witness William Bodin, were dismissed (Pet. App. A 2). The jury also found LaBelle, Inc., of which petitioner was president, guilty on these seventeen counts. Petitioner and LaBelle were acquitted on nine other substantive counts.

In pertinent part, the information charged that petitioner had wilfully infringed the copyrights of certain sound recordings. Each of the twenty-six substantive counts identified a particular sound recording, whose copyright petitioner allegedly had infringed, by name, recording artist, copyright owner, and registration number (Pet. App. A 4). The information did not refer to the musical composition underlying any of these recordings (*ibid.*). However, the information charged that petitioner's acts violated 17 U.S.C. 1, 101(e) (Supp. IV), and 104 (Pet. App. A 2). In fact, Section 101(e) prohibits the unauthorized manufacture of copyrighted musical compositions. The proper statutory citation was 17 U.S.C. (Supp. IV) 1(f), which grants copyright protection to sound recordings.

Barring actual prejudice, miscitation of a statute in an information or indictment is not grounds for its dismissal, if it otherwise charges an offense against the United States. See, *e.g.*, *United States* v. *Hutcheson*, 312 U.S. 219, 229; *Williams* v. *United States*, 168 U.S. 382. Rule 7(c)(3), Fed. R. Crim. P., provides:

> Error in the citation [of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated] or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

The record clearly supports the court of appeals' conclusion that petitioner was not prejudiced by the erroneous citation of Section 101(e) (Pet. App. A 4). The information expressly stated that petitioner was accused of the infringement of sound recording copyrights and did not mention muscial compositions. The precise specification of each copyrighted recording allegedly infringed constituted a plain, concise, and definite statement of the essential facts of the offense charged, as required by Fed. R. Crim. P. 7(c)(1).

Furthermore, any possible ambiguity caused by the miscitation was eliminated by the district court's ruling on petitioner's motion to dismiss the information, in which the court stated (Pet. App. B 15):

> It is manifest that the defendants are charged with infringing * * * copyrighted sound recordings and not the infringement of copyrighted musical compositions. Under the allegations contained in the Information, we do not perceive how the defendants could possibly be misled as to the offenses with which they stand charged.[2]

Under these circumstances, petitioner was fully apprised

[2]Petitioner's contention (Pet. 8-9) that the district court did not clarify the nature of the offense charged in the information until just prior to the presentation of final arguments to the jury is therefore incorrect.

Moreover, petitioner could not have been prejudiced by the dictum in the district court's opinion on the motion to dismiss that the government would have to prove the unauthorized manufacture, sale *or* use of a sound recording at trial (Pet. App. B 11). Even if he had defended on the assumption that the government need only prove one of these three elements, petitioner thereby would have offered a fully effective defense, for the jury must find both unauthorized production *and* distribution in order to convict under Section 1(f).

Petitioner's argument (Pet. 11) that the district court improperly permitted the government to amend the information after final argument merely restates his contention that the nature of the offense with which he was charged was not clarified until near the end of the trial. Fed. R. Crim. P. 7(e) permits amendment of the information at any time before the verdict if the defendant is not prejudiced thereby. As discussed in the text, petitioner was not prejudiced by the miscitation in the information and therefore could not have been prejudiced by its correction.

of the charges against him and was not prejudiced by the erroneous reference to Section 101(e) in the information.[3]

2. Petitioner also contends (Pet. 12) that his acquittal on the conspiracy count precluded his conviction on the substantive copyright infringement charges in a unitary trial. He argues that the res judicata effect of the jury's findings of fact in his favor on the conspiracy count necessarily prevents his conviction on the substantive counts.

In general, a conspiracy and the substantive offense which is its object are separate offenses, requiring proof of different facts. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770; *Pereira* v. *United States*, 347 U.S. 1. The

[3]Petitioner erroneously suggests (Pet. 7) that the trial court improperly instructed the jury that the government need prove only that he had manufactured, used *or* sold unauthorized sound recordings, as required by Section 101(e). But the court expressly instructed the jury in the language of Section 1(f) that in order to convict, they must find that petitioner had produced *and* distributed the sound recordings without authorization. The court also gave a supplemental instruction setting forth these elements of the offense upon petitioner's suggestion that further guidance might be necessary to cure an inadvertent misstatement of the elements of the offense in a prior supplemental instruction.

Hughes v. *United States*, 340 F.2d 609 (C.A. 1), upon which petitioner relies (Pet. 10), merely established that if the statute itself fails to set forth all necessary elements of the offense in an express manner, an information simply tracking the words of the statute is insufficient to state an offense. Similarly, *United States* v. *Donovan*, 339 F.2d 404 (C.A. 7), held that where a statute proscribes different types of conduct in the disjunctive, an indictment merely reciting the language of the statute fails to inform the accused of the offense with which he is charged. But since the charges here at issue were set forth with a great degree of particularity in the information, those decisions are not in conflict with the decision of the court of appeals in this case.

essence of the crime of conspiracy is an agreement to commit an unlawful act. Acquittal on the conspiracy charge does not necessarily resolve in defendant's favor any fact necessary to convict for the underlying offense, but simply may show that the prosecution failed to prove the existence of an agreement among the alleged conspirators.[4] Thus, petitioner is wholly unjustified in arguing (Pet. 15-16) that by acquitting him on the conspiracy count, the jury in essence found that he had committed no overt act of copyright infringement.

Moreover, even if the verdicts were inconsistent, that would be no ground for setting aside the conviction. *Hamling* v. *United States*, 418 U.S. 87, 100.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] *Sealfon* v. *United States*, 332 U.S. 575, and *United States* v. *Cole*, 449 F.2d 194 (C.A. 8), certiorari denied, 405 U.S. 931, upon which petitioner relies (Pet. 14-16), establish that following an acquittal on a conspiracy indictment, the government *may* be precluded from initiating an independent prosecution of the same person on the substantive offenses by operation of the doctrine of collateral estoppel. Whether a second trial is barred depends upon the reviewing court's construction of the issues actually decided at the first trial. See, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436. In the instant case, however, all charges were considered at a single trial, so these authorities are not applicable.